

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-001749

07/21/2016

HON. ROGER E. BRODMAN

CLERK OF THE COURT

T. Cooley

Deputy

H A M THUNDERBIRD L L C, et al.

DALE S ZEITLIN

v.

CLINT BERKEY, et al.

CHRISTOPHER L ENOS

MINUTE ENTRY

On July 14, 2016, this Court held an evidentiary hearing on plaintiffs' motion for a preliminary injunction. The Court heard testimony from Ken Rae, Dawn Zeitlin, Eric Maceydo and Caleb Berkey. The Court reviewed the exhibits in this case.

Dutch Brothers professes to be a "good neighbor." The facts demonstrate it is not.

ANALYSIS

An applicant for a preliminary injunction must show: (1) a strong likelihood of succeeding on the merits; (2) the possibility of irreparable injury not remediable by damages if relief is withheld; (3) a balance of the equities in its favor; and (4) that public policy favors granting the relief. IB Property Holdings, LLC v. Rancho Del Mar Apartments, Ltd. Partnership, 228 Ariz. 61, 64 – 65, ¶ 9 (App. 2011); Smith v. Arizona Citizens Commission, 212 Ariz. 407, 410-11 (2006). This test is flexible based on specific facts and circumstances, and is a sliding scale. Id. The Court will address each of these factors.

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1. Likelihood of Success on the Merits

The Court believes that plaintiffs established a strong likelihood of success on the merits.

There is no question that the CC&Rs apply to defendants' property. The CC&Rs provide that each of the parcels has a nonexclusive easements in, to, over and across the Common Area for passage of vehicles. Paragraph 2.02 provides that there shall be no obstructions "so as to materially impede or materially interfere with the flow of vehicular and pedestrian traffic between those portions of the Parcels" devoted to Access Driveways or Parking Area, or "in any manner that would unreasonably restrict or interfere with the use and enjoyment by any of the Parties of the rights and easements created by this Article II." Defendants' customers are creating a temporary barrier which materially interferes with the flow of traffic through the Parking Areas.

In addition, the CC&Rs clearly provide that parties are "not to obstruct or interfere in any way with the free flow of pedestrian and vehicular traffic over the road ways which comprise the Access Driveways." Declaration § 2.01(d)(ii). Although this provision applies specifically to the Access Driveways, the provision is consistent with the intent of the CC&Rs to provide unobstructed access.

Plaintiffs established that on numerous occasions throughout the day the traffic from defendants' location compromises traffic flow in plaintiffs' parking lot. Although defendants contest the extent and frequency of the traffic backups, even Mr. Berkey testified that "it can get that busy" when describing plaintiffs' photographs.

In short, the clear purpose of the CC&Rs is to allow patrons of all tenants or property owners to have reasonable use and enjoyment of the common areas. The Court finds that the business conducted by Dutch Brothers unreasonably restricts or interferes with plaintiffs' tenants' patron's ability to obtain reasonable access to parking in the Common Areas. The lines for Dutch Brothers are so long that the queue backs up and restricts and interferes with plaintiffs' tenants' patrons. The evidence demonstrates that Dutch Brothers' patrons have blocked parking access routes and interfered with the reasonable use and enjoyment of plaintiffs' tenants.

The Court found both Mr. Rae and Ms. Zeitlin credible when they testified that Dutch Brothers patrons create traffic circulation and parking problems in the parking lot on plaintiffs' property. The Court finds that tenants on the west side of the shopping center (off 84th Drive) have complained. The Court finds that Dutch Brothers patrons regularly block drive aisles and parking spaces used by plaintiffs' tenants, creating gridlock like conditions in portions of the parking lot during busy times. See Exhibit 4, especially the February 25, 2016 and April 6, 2016 photographs.

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The Court found Mr. Maceyko's study persuasive for the limited purposes of this preliminary injunction hearing. On the north side, during peak morning hours on a Tuesday, defendants had 12 vehicles above queue capacity on multiple occasions. In the late afternoon, defendants had up to 14 vehicles above queue capacity.

On the south side, defendants had up to nine vehicles above queue capacity in the morning and eight vehicles above queue capacity at midday. Excess queue, of course, ends up as a line of cars on plaintiffs' property. In short, defendants are requiring the neighboring property owners to bear the burden of their insufficient queue capacity on defendants' own property.

The Court finds that the circulation and parking problems caused by Dutch Brothers' patrons could cause plaintiffs' tenants patrons to stay away, especially during times that Dutch Brothers is extraordinarily busy. (The Court would not want to negotiate a parking lot in the condition described by several of the photographs in Exhibit 4.)

The Court believes that the problem is of defendants' creation by placing two drive-through businesses on a relatively small parcel and not accounting for the lines created by a drive-through business. Defendants provided insufficient queue space on their own property.

The situation is likely to become worse, not better. The Court found Ms. Zeitlin credible when she testified that the problem was worse today than two years ago. Mr. Berkey acknowledged that the business has "grown." In other words, the situation will not cure itself.

The Court finds that the situation appears to be more problematic on the southwest side than on the north side. Plaintiffs' witnesses acknowledge that only tenants on the west side have complained. The north side is farther away from the business establishments and would appear to present the best option for handling traffic.

In addition, parking lot sales violate the CC&Rs. See § 2.01 (parking lot sales interfering with ingress and egress are prohibited). In addition, plaintiffs have the right to prohibit defendants' employees from making sales on plaintiffs' property. While customers are free to pass through the common areas on their way to defendants' business, nothing in the CC&Rs suggests that defendants can go on to plaintiffs' property to make sales or conduct business. While the parties can debate whether taking orders in the parking lot creates a risk for the person taking the order, the fact is that plaintiffs should not have to bear any risk of injury to defendants' employees while they are working.

Plaintiffs raised these issues with defendants at least two years ago and, in the Court's view, defendants have done little if anything to correct the problem.

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Plaintiffs presented issues about security and trash at the site. The Court was not persuaded that Dutch Brothers is at fault for the alleged caffeine-infused “gangs” on the property. If added security is necessary, plaintiffs can hire additional security and assert a claim against defendants for monetary damages. The Court would expect Dutch Brothers to assist in trash collection generated by Dutch Brothers’ customers. If not and trash is generated by Dutch Brothers’ customers, plaintiffs may have a claim for monetary damages.

2. Irreparable Harm

The Court believes that plaintiffs demonstrated irreparable harm with regard to the parking situation. Although the security guard and trash questions can be remedied through monetary damages (i.e., costs to hire additional security or cleanup personnel), the parking situation is something that would be difficult if not impossible to measure through monetary damages.

In addition, ¶ 12.04 provides that parties “shall have the right to enjoin” violations or threatened violations and “to bring an action for declaratory relief in a court of competent jurisdiction.” Thus, the CC&Rs expressly authorize the instant action.

3. Equity

The issue of equity is difficult. On the one hand, the Court finds that plaintiffs have been damaged by defendants’ conduct, that plaintiffs placed defendants on notice of the problem and that defendants took insufficient action to correct the problem.

On the other hand, the problem has been ongoing for more than two years. The Court was persuaded that an immediate injunction shutting down Dutch Brothers would drive Dutch Brothers out of business. The Court has no interest in forcing a successful business out of business.¹

The Court is not in the design engineering business and is reluctant to engage in crafting a traffic engineering solution to remedy the problem. As a result, the Court believes that equity is best served by issuing a graduated plan with distinct milestones that gives defendants a brief period of time to come up with a solution.

¹ Unless, of course, Dutch Brothers continues to ignore the problem.

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4. Public Policy

The Court does not see public policy cutting in either direction here. On the one hand, public policy supports enforcement of CC&Rs and safe parking lots. On the other hand, public policy also supports small businesses and hot coffee drinks.

ORDERS

IT IS HEREBY ORDERED AS FOLLOWS:

1. Plaintiffs' request for a preliminary injunction is granted, in part. Defendants are immediately enjoined from having their employees take orders on plaintiffs' property.

2. Defendants are immediately enjoined from allowing their customers to block plaintiff's 84th Drive entrance.

3. Effective January 15, 2017, Dutch Brothers is enjoined from allowing its customers to queue and stack on plaintiffs' property. The start date for this injunction may be modified if defendants take (or are taking) appropriate action to resolve the situation.

4. Within 60 days from the date of this Order, defendants are to propose an engineered plan to satisfactorily resolve this problem. Defendants are to furnish a copy of their plan to plaintiffs and to the Court.

5. The trial setting conference scheduled for December 16, 2016 at 9:00 a.m. is vacated and a status hearing is set for **December 16, 2016 at 1:30 p.m. (time allotted: 60 minutes)** to discuss whether the injunction provided in paragraph 3 should be eliminated or modified. In determining its next order, the Court will take into account whether **both** parties have engaged in reasonable, good faith efforts to reach an economically viable solution to this problem. In short, the Court considers the next hearing to be a compliance hearing. If the parties wish the Court to consider any reports or exhibits, they shall submit such documents to the Court at least one week prior to the hearing.

DATED this 21st day of July, 2016.

/s/ Honorable Roger Brodman
HONORABLE ROGER BRODMAN
JUDICIAL OFFICER OF THE SUPERIOR COURT